

Department of the Army, DoD

§ 536.38

deployment) may be payable under subparts C or J of this part. However, priority should be given to the use of AR 405-15 as it is more flexible and expeditious. In contingency operations and deployments, there is a large potential for overlap between contractual property damage claims and noncombat activity/maneuver claims. Investigate carefully to ensure the claim is in the proper channel (claims or real estate), that it is fairly settled, and that the claimant does not receive a double payment. For additional guidance, see subpart J of this part and United States Army Claims Service Europe (USACSEUR) Real Estate/Office of the Judge Advocate Standard Operating Procedures for Processing Claims Involving Real Estate During Contingency Operations (August 20, 2002).

(n) *Claims generated by civil works projects.* Civil works projects claims arising from tortious activities are defined by whether the negligent or wrongful act or omission arising from a project or activity is funded by a civil works appropriation. Civil works claims are those noncontractual claims which arise from a negligent or wrongful act or omission during the performance of a project or activity funded by civil works appropriations as distinguished from a project or activity funded by Army operation and maintenance funds. Civil works claims are paid out of civil works appropriations to the extent set forth in § 536.71(f). A civil works claim can also arise out of a noncombat activity, for example, an inverse condemnation claim in which flooding exceeds the high water mark. Maritime claims under subpart H of this part are civil works claims when they arise out of the operation of a dam, locks or navigational aid.

NOTE TO § 536.34: See parallel discussion at DA Pam 27-162, paragraph 2-1.

§ 536.35 Unique issues related to environmental claims.

Claims for property damage, personal injury, or death arising in the United States based on contamination by toxic substances found in the air or the ground must be reported by USARCS to the Environmental Law Division of the Army Litigation Center and the Environmental Torts Branch of DOJ.

Such claims arising overseas must be reported to the Command Claims Service with geographical jurisdiction over the claim and USARCS. Claims for personal injury from contamination frequently arise at an area that is the subject of claims for cleanup of the contamination site. The cleanup claims involve other Army agencies, use of separate funds, and prolonged investigation. Administrative settlement is not usually feasible because settlement of property damage claims must cover all damages, including personal injury. Payment by Defense Environmental Rehabilitation Funds should be considered initially and any such payment should be deducted from any settlement under AR 27-20.

§ 536.36 Related remedies.

An ACO or a CPO routinely receives claims or inquiries about claims that clearly are not cognizable under this part. It is the DA's policy that every effort be made to discover another remedy and inform the inquirer as to its nature. Claims personnel will familiarize themselves with the remedies set forth in DA Pam 27-162, paragraph 2-17, to carry out this policy. If no appropriate remedy can be discovered, forward the file to the Commander USARCS, with recommendations.

§ 536.37 Importance of the claims investigation.

Prompt and thorough investigation will be conducted on all potential and actual claims for and against the government. Evidence developed during an investigation provides the basis for every subsequent step in the administrative settlement of a claim or in the pursuit of a lawsuit. Claims personnel must gather and record adverse as well as favorable information. The CJA, claims attorney or unit claims officer must preserve their legal and factual findings.

§ 536.38 Elements of the investigation.

(a) The investigation is conducted to ascertain the facts of an incident. Which facts are relevant often depends on the law and regulations applicable to the conduct of the parties involved but generally the investigation should develop definitive answers to such

questions as “When?” “Where?” “Who?” “What?” and “How?”. Typically, the time, place, persons, and circumstances involved in an incident may be established by a simple report, but its cause and the resulting damage may require extensive effort to obtain all the pertinent facts.

(b) The object of the investigation is to gather, with the least possible delay, the best available evidence without accumulating excessive evidence concerning any particular fact. The claimant is often an excellent source of such information and should be contacted early in the investigation, particularly when there is a question as to whether the claim was timely filed.

§ 536.39 Use of experts, consultants and appraisers.

(a) ACOs or CPOs will budget operation and maintenance (O&M) funds for the costs of hiring property appraisers, accident reconstructionists, expert consultants to furnish opinions, and medical specialists to conduct independent medical examinations (IMEs). Other expenses to be provided for from O&M funds include the purchase of documents, such as medical records, and the hiring of mediators. See § 536.53(b). Where the cost exceeds \$750 or local funds are exhausted, a request for funding should be directed to the Commander USARCS, with appropriate justification. The USARCS AAO must be notified as soon as possible when an accident reconstruction is indicated.

(b) Where the claim arises from treatment at an Army MTF, the MEDDAC commander should be requested to fund the cost of an independent consultant's opinion or an IME.

(c) The use of outside consultants and appraisers should be limited to claims in which liability or damages cannot be determined otherwise and in which the use of such sources is economically feasible, for instance, where property damage is high in amount and not determinable by a government appraiser or where the extent of personal injury is serious and a government IME is neither available nor acceptable to a claimant. Prior to such an examination at an MTF, ensure that the necessary

specialists are available and a prompt written report may be obtained.

(d) Either an IME or an expert opinion is procured by means of a personal services contract under the Federal Acquisition Regulation (FAR), part 37, 48 CFR 37.000 *et seq.*, through the local contracting office. The contract must be in effect prior to commencement of the records review. Payment is authorized only upon receipt of a written report responsive to the questions asked by the CJA or claims attorney.

(e) Whenever a source other than claims personnel is used to assist in the evaluation of a claim in which medical information protected by HIPAA is involved, the source must sign an agreement designed to protect the patient's privacy rights.

§ 536.40 Conducting the investigation.

(a) The methods and techniques for investigating specific categories of claims are set forth in DA Pam 27-162, paragraphs 2-25 through 2-34. The investigation of medical malpractice claims should be conducted by a CJA or claims attorney, using a medical claims investigator.

(b) A properly filed claim must contain enough information to permit investigation. For example, if the claim does not specify the date, location or details of every incident complained of, the claimant or legal representative should be required to furnish the information.

(c) Request the claimant or legal representative to specify a theory of liability. However, the investigation should not be limited to the theories specified, particularly where the claimant is unrepresented. All logical theories should be investigated.

§ 536.41 Determination of liability—generally.

(a) Under the FTCA, the United States is liable in the same manner and to the same extent as a private individual under like circumstances in accordance with the law of the place where the act or omission giving rise to the tort occurred (28 U.S.C. 2673 and 2674). This means that liability must rest on the existence of a tort cognizable under state law, hereinafter referred to as a state tort. A finding of